

**NEED FOR JUDICIAL ACTIVISM IN SOLVING LEGAL AND
PROCEDURAL BARRIERS TO ENVIRONMENTAL LITIGATION IN
NIGERIA**

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ABSTRACT

Environmental litigation is bedevilled with legal and procedural obstacles, which prevent environmental victims from getting redress for environmental injury. The aim and objectives of this paper is to discuss environmental litigation and barriers to it in Nigeria. This paper also discusses the concept of judicial activism and how it can be applied to environmental litigation in Nigeria for the purpose of mitigating the legal and procedural obstacles to environmental litigation. The paper adopts a non-doctrinal research methodology. This paper notes that the barriers are detrimental to the environment, as pollution victims are prevented from getting redress for environmental wrongs and environmental justice. It concludes that the Court must be ready to display activism in adjudicating environmental matters, in order to enhance access to environmental justice and protect the Nigerian environment. This paper calls for judicial activism such as widening of locus standi, expounding the interpretation of legislation, exercising judicial review, allowing Public Interest Litigation etc. in the adjudication of environmental matters. This will help to mitigate the obstacles to environmental litigation , enhance access to environmental justice, facilitate redress of environmental wrongs, enhance adequate remedies for environmental victims, allow the proper sanctioning of environmental polluters and `also enhance the protection and sustainability of the environment.

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1. INTRODUCTION

The environment is very important to man as it serves as support system to man.³³ All human endeavours such as social, economic, cultural, political, educational etc. are dependent on the environment. However increase in human population³⁴ and the quest for economic development³⁵ have overstretched the environment; as they have caused explosive urban development, industrialization, encroachment and contamination of virgin land. These activities have led to environmental pollution and degradation which threaten the sustainability of the environment. Nigeria is not an exception as it is battling with different environmental problems such as oil spillage, loss of biodiversity, desertification, deforestation, soil erosion, flood, gas flaring³⁶ etc. Therefore, environmental legislation and regulations are put in place for the protection of the environment³⁷ against pollution and degradation from human activities. Environmental Litigation is the tool employed by environmental litigants to enforce environmental laws and regulations in Nigeria. The State High Courts or Federal High Court³⁸ can have jurisdiction in environmental matters³⁹ at first instance except for those matters that are within the exclusive jurisdiction of the Federal High Court.⁴⁰ Other specialized or magistrate courts may also adjudicate environmental matters in Nigeria. Environmental legislation may also confer jurisdiction on the court to adjudicate their provisions. However, environmental plaintiffs are sometimes confronted with many challenges in the course of litigating environmental matters in Nigeria. These barriers hinder environmental litigants from seeking redress for environmental harms and injuries they have suffered. And where a plaintiff fails to surmount these barriers, he may not get remedy, even where he has a course of action. This has led to the denial of justice to environmental victims, non-sanction or inadequate sanction of polluters, increased level of environmental pollution and inadequate restoration/cleaning of the environment by polluters. It is pertinent to note that the Court must be able

³³ Orunoye E.D and Ahmed Y.M, "The role of enforcement in environmental protection in Nigeria" 7 /1 *World Journal of Advanced Research and Reviews* 48 (2020)

³⁴ *ibid*

³⁵ Eneh OC and Agbazue VC, "Protection of Nigeria's Environment: A critical Policy Review" 6/ 5 *Journal of Environmental Science and Technology* 490 (2011)

³⁶ Ugboma P.P, "Environmental Degradation in Oil Producing Areas of Niger Delta Region, Nigeria: the Need for Sustainable Development" 4 No. 2, S/No 10 *International Journal of Science and Technology*, 75 (2015)

³⁷ Orunoye E.D and Ahmed Y.M, P. 48

³⁸ The Constitution of the Federal Republic Of Nigeria (As Altered), S.251 (1) (n) , the Federal High Court Act, S. 7

³⁹ National Environmental Standards and Regulations Enforcement Agency Act, S.37 where *Court* was interpreted as Federal or State High Court

⁴⁰ The Constitution of the Federal Republic Of Nigeria (As Altered), S.251 (1) (n)

display activism in adjudicating environmental matters in order to break the barriers that prevent environmental victims from obtaining redress and realizing environmental justice.⁴¹

This paper shall therefore discuss environmental litigation in Nigeria, the legal and procedural constraints to environmental litigation in Nigeria and also discuss how judicial activism can be explored to surmount these constraints.

2. LEGAL FRAMEWORK ON ENVIRONMENTAL PROTECTION IN NIGERIA

2.1 The Constitution of the Federal Republic of Nigeria (As Altered)

The constitution (As altered) recognized the importance of the environment in Section 20 in Chapter II as it stipulates that:

“the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria”

This provision stresses the need for the state to protect the environment and maintain a sound ecological balance in Nigeria.⁴² It also underlines the duty to refrain from degrading the environment. This provision of the Constitution has received judicial pronouncements; the Supreme Court in *Attorney General Lagos State V. Attorney General Federation & Ors*⁴³ held that it is for the protection and improvement of the environment in Nigeria.

However, the provision of Section 20 is not justiciable by the purport of the provision of Section 6 (C) (C) of the Constitution which bars the Court from making any pronouncement on the Fundamental Objectives and Directive Principles of State Policy as set out in Chapter II of the Constitution. Citizens are prevented from enforcing the state’s obligation as provided in Section 20 of the 1999 Constitution⁴⁴ and the constitutional provision did not stipulate how the Government seeks to achieve the environmental objective.⁴⁵

2.2 The Environmental Impact Assessment Act

The EIA Act provides that environmental impact assessment of certain mandatory projects or projects referred to mediation or review panel must be conducted before such projects can be

⁴¹ R.A Mmadu, “Judicial Attitude to Environmental Litigation And Access to Environmental Justice in Nigeria: Lessons from Kiobel” *Afe Babalola University: Journal of Sustainable Development Law and Policy* 170 (2013)

⁴² Okonkwo T., “Environmental constitutionalism in Nigeria: Are we there yet?” *13 Nigerian Juridical Review* 184 (2015)

⁴³ I WRN 2003 35

⁴⁴ Ugbaja F, *Regulation of Environmental Pollution in the Nigerian Oil and Gas Industry: The Need for an Alternative Approach* (2016) (Unpublished Ph.D Thesis, Faculty of Graduate Studies, University of Calgary) 54

⁴⁵ Akpambang E.M, “Promoting The Right To A Healthy Environment Through Constitutionalism In Nigeria” *4/3 International Journal of Environment and Pollution Research* 50 (2016)

carried out.⁴⁶ The Act stipulates the processes for assessing changes occasioned by development in the environment in order to determine the benefits or adverse effects of such projects. These projects are listed in Schedule 1- 19 to the Act.

Section 15 of the EIA Act stipulates the category of projects that can enjoy waiver of EIA report. These are the projects that the Agency opines they are in the opinion of President of Nigeria have minimal impact on the environment, or those carried out by the Government during national emergencies or in the interest of public health and safety.

2.3 National Environmental Standards and Regulations Enforcement Agency Act

It was enacted in 2007 and confers the responsibility of the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources on NESREA. Section 7 of the Act stipulated the functions of the Agency, The Act also empowers NESREA to monitor and assess compliance with environmental regulations, guidelines, directions and standards⁴⁷ to ensure the protection of the environment, conservation of biodiversity and sustainability of natural resources in Nigeria.⁴⁸ The Act also confers the Agency with the power to prohibit the use of technologies that are detrimental to the environment.⁴⁹ NESREA also has the right in collaboration with relevant agencies to create programmes and regulations for setting standards for the purpose of enhancing environmental protection in Nigeria⁵⁰ and can search any premises⁵¹ through its officer to seize and detain items in order to ascertain whether any environmental law or standard has been contravened or compromised.⁵² It is pertinent to note that the functions⁵³ and powers⁵⁴ of the NESREA does not extend to the Oil and Gas Sector in Nigeria⁵⁵ Section 34 of the Act empowers the Minister of Environment to make regulations for the Agency and section 34 (C) of the Act specifically gives the Minister the power to make regulations for the purpose of giving effect to the functions of the Agency under the Act.

⁴⁶ Environmental Impact Assessment Act, S.12

⁴⁷ Environmental Impact Assessment Act, S.8

⁴⁸ M. T Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria" 8 *Law Environment and Development Journal* 121 (2012)

⁴⁹ National Environmental Standards and Regulations Enforcement Agency Act, S.8 (d)

⁵⁰ National Environmental Standards and Regulations Enforcement Agency Act, s.8 (o)

⁵¹ National Environmental Standards and Regulations Enforcement Agency Act, s.30 (a)

⁵² National Environmental Standards and Regulations Enforcement Agency Act, s.30 (f)

⁵³ National Environmental Standards and Regulations Enforcement Agency Act. s. 7 (g)- (l)

⁵⁴ National Environmental Standards and Regulations Enforcement Agency Act s.8 (k), (l), (m), (n) and (s)

⁵⁵ Nwachukwu N.C, "Health Care Management –Public Health Benefits and the Need for Effective Environmental Regulatory Surveillance in Federal Republic of Nigeria", in Alfonso J.R (ed.), *Current Topics In Public Health*, 170 (IntechOpen, 2013)

2.4 Petroleum Industry Act

This Act provides for the legal, governance, regulatory and fiscal framework for the Nigerian petroleum Industry. Section 1 and 2 provides for the vesting and objectives of the Act. Section 3 empowers the minister to make regulations. Chapter II provides for petroleum administration. Chapter III makes provisions for host communities through the creation of trust funds to compensate traumatized host communities, The Act promotes public safety and environmental protection

3. ENVIRONMENTAL LITIGATION IN NIGERIA

Environmental litigation is a means of enforcing environmental laws in Nigeria, and also to redress environmental wrongs, sanction environmental polluters, compensate environmental victims and enhance the protection of the environment. The State High Court⁵⁶ or Federal High Court⁵⁷ can have jurisdiction in environmental matters⁵⁸ at first instance depending on the nature of the matter. Other specialised or magistrate courts may also adjudicate environmental matters in Nigeria.⁵⁹ Environmental legislation may also confer jurisdiction on the court to adjudicate their provisions.

3.1 Nature of Environmental Litigation in Nigeria

Environmental litigation can either be in form of criminal prosecutions or civil litigation. The civil form of environmental litigation can be based on tort or enforcement of fundamental human rights. However, the most utilized forms of initiating environmental litigations in Nigeria are the traditional common law rules of torts.⁶⁰ This is premised on the fact that Nigeria was a former British colony and inherited the common law torts principles, which has formed part of Nigerian law. The torts remedies allow environmental litigants to claim monetary compensation and injunctive reliefs.⁶¹ Some of the various forms of environmental litigations in Nigeria are discussed below:

⁵⁶ Subject to the provision of various environmental legislation

⁵⁷ The Constitution of the Federal Republic Of Nigeria (As Altered), s.251 (1) (n) for the exclusive list and the Federal High Court Act, s.7

⁵⁸ National Environmental Standards and Regulations Enforcement Agency Act, s.37 where *Court* was interpreted as ' Federal or State High Court'

⁵⁹ Subject to the provisions of various states' environmental legislation

⁶⁰ Negligence, strict liability, nuisance and trespass

⁶¹ Isa A.P, *Legal Remedies For Victims Of Environmental Pollution In Nigeria* (2014) (Unpublished PhD Thesis, Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria) 32

3.1.1. Negligence

This is one of the common law tort remedies for initiating environmental matters in courts in Nigeria. It is the breach of a legal duty by a person to take care, the result of which damage was done to another person, to whom the duty is owed.⁶² It has also been defined as the omission to do something which a reasonable man guided upon consideration, which ordinarily regulates the conduct of human affairs, would do.⁶³ A plaintiff in an action for claim for negligence must plead and prove all the necessary ingredients of negligence to be able to succeed⁶⁴,

A plaintiff's claims in an action for negligence will not succeed, if he fails to prove that a duty of care was imposed on the defendant. The plaintiff must establish that the harm he suffered was reasonably foreseeable by the defendant⁶⁵ and that he was in a sufficient proximity to the defendant.⁶⁶ A plaintiff must prove all the three ingredients cumulatively.⁶⁷ A plaintiff also has the option of relying on the principle of *res ipsa loquitur*⁶⁸, which allows the plaintiff to shift the onus of proof to the defendant. This shifts the onus of proof to the defendant, and by this the defendant will have to prove to the court that he was not negligent. Where the defendant is however able to prove to the court that he exercised duty of care and that the harm suffered by the plaintiff was not as a result of his negligence, the burden of proof will shift back to the plaintiff. It is pertinent to note that a plaintiff's action will fail where the plaintiff establishes that he has suffered harm but the defendant has proved to the court that the harm suffered by the defendant was not caused by him as he has exercised duty of care.⁶⁹ The court may not compensate a plaintiff even when the harm he has suffered was obvious and enormous, once the defendant has successfully proved to the court that he was not negligent.⁷⁰ See *Mr. Bayo Ayadi V. Mobil Producing Nigeria Unlimited and Universal Trust Bank of Nigeria V. Fidelia Ozoemena*⁷¹,

⁶² *Mobil Oil V. Barbados Cars LTD* (2016) LPELR-41 (CA)

⁶³ *Ugbechi (NIG) LTD V. Falke* (2017) LPELR (CA),

⁶⁴ *MTN V. Mundra Ventures (NIG) LTD* (2016) LPELR-40343 (CA)

⁶⁵ *Shell Petroleum Development Company Nigeria LTD V Ikontia* (2010) LPELR-491 (CA)

⁶⁶ *Abubakar V Joseph* (2008) LPELR-48 (SC)

⁶⁷ *Royal Ade NIG. LTD V N.O.C.M. CO. PLC* (2004) LPELR-2959 (SC)

⁶⁸ It is a legal maxim which literarily means ' the situation speaks for itself'

⁶⁹ *Mr. Bayo Ayadi V. Mobil Producing Nigeria Unlimited* (*supra*)

⁷⁰ *Universal Trust Bank of Nigeria V. Fidelia Ozoemena* (2007) LPELR-3414 (SC),

⁷¹ *Supra*

3.1.2 Nuisance

This is another common law tort rule that is commonly used in addressing environmental concerns.⁷² It is concerned with the protection of the environment; therefore issues like oil pollution, noxious fumes, offensive odour from animal buildings, noise from industries etc. are usually addressed by nuisance actions.⁷³ In nuisance, the law is concerned with the effects of the defendant's conduct on the plaintiff rather than the nature of the defendant's conduct.⁷⁴ Therefore a defendant may be liable even if his conduct was unintentional⁷⁵ and lawful.⁷⁶ Nuisance may either be private or public; public nuisance causes damage or injury to the generality of the population or upon all of a class within its ambit.⁷⁷ Private nuisance on the other hand interferes with a person's use and enjoyment of land or some rights attached to it.⁷⁸ Private individuals have *locus standi* in public nuisance⁷⁹, as it is also an injury which confers a right of action on the affected persons.⁸⁰ This is irrespective of the facts that his private rights or his rights as a member of the public were affected by the public nuisance. An individual plaintiff in public nuisance is however expected to establish the injury he has suffered before the court⁸¹ and must prove that the nuisance affected sufficient number of persons to make it a public nuisance. For an action in private nuisance, a plaintiff must establish that the nuisance has caused a physical injury to his property or it has interfered with the ordinary use and enjoyment of his property.⁸² However, where a claimant fails to adduce a credible evidence to substantiate his case, this remedy will not avail him.⁸³ See the case of *Hong Kong Synthetic Fibre V. Monsuru Ajibawo*⁸⁴ and *Helios Tower Limited V Mr. Isiaka Bello*⁸⁵.

3.1.3 Strict Liability

This is another common law rule for litigating environmental matters in Nigeria. This rule makes a defendant liable for his actions without the plaintiff having to prove his negligence;

⁷² Ltham M et al "The Intersection of Tort and Environmental Law: Where The Twains Should Meet and Depart" 80 /2 *Fordham Law Review* 750 (2011)

⁷³ *Fafunwa V. Bellview Travels LTD* (2013) LPELR -20800 (CA)

⁷⁴ Brennan C, "Nuisance and Rylands V. Fletcher" in Brennan C. (ed.), *Tort Law Concentrate (Law Revisions and Study Guide)* 137 (Oxford University Press, Oxford, 2015)

⁷⁵ Fraley J. M, "Liability for Unintentional Nuisances: How the Restatement of Torts Almost Negligently Killed the Right to Exclude in Property Law" *121 West Virginia Law Review* 429 (2018)

⁷⁶ *Abdullah V. The Military Governor of Lagos State* (1988) LPELR-20266 (CA)

⁷⁷ *Adediran V. Interland Transport* (1991) LPELR-88(SC)

⁷⁸ *Seven Up Bottling CO. PLC V. Obamwonyi Uyigwe* (2012)

⁷⁹ *Orike V. Osiagor* (2010) LPELR-3955 (CA)

⁸⁰ *Adediran V. Interland Transport* (Supra)

⁸¹ As this will confer him with a right of action, *Adediran V. Interland Transport* (Supra)

⁸² *Universal Trust Bank V. Ozomena* (Supra)

⁸³ *Helios Tower Limited V Mr. Isiaka Bello* (2015) LPELR- 25206 (CA)

⁸⁴ (2008) LCN/2662

⁸⁵ Supra

and the defendant will nonetheless be liable for his actions even if he had taken necessary precautions. Before the rule can be applicable for environmental claims, the defendant must have brought, collected or kept something that is not natural on his land and the thing must be known to be likely to harm if it escapes. Such things must escape in order for the defendant to be strictly liable for the anticipated consequences and whether the acts were an accident or done without any wrongful intent will not exonerate the defendant from liability. A plaintiff in a claim for strict liability must prove that there was an escape of materials from the defendant's land to his land, which has caused some damages to his land. He must also establish that the defendant's use of his land was non-natural⁸⁶ and that the defendant was not reasonable in the use of his land.

However, there are exceptions⁸⁷ and defences to this rule; and a defendant who is able to prove any of these may not be held liable for the harm caused to the plaintiff by his use of the land. See *Atunbin V, Shell Petroleum Development Company Nigeria Ltd*⁸⁸ and *Shell Petroleum Development Company Nigeria Ltd V Chief Otoko*⁸⁹,

3.1.4 Trespass to land

This is another common law torts rule and it is useful for instituting environmental matters in Nigeria. Trespass is the intentional entry by a person into the land possessed by another without permission. It also refers to the unlawful interference of objects onto a person's land by another, thereby tampering with the interest of the owner or occupier of such a land.⁹⁰ This rule is applicable to environmental matters in Nigeria, as civil claims can be based on the unlawful escape of objects into another person's land.⁹¹ For example, the unlawful intrusion of oil from leaked pipelines or underground tanks to another person's property or land is a trespass which is actionable and the tortfeasor will be held liable. It is pertinent to note that most trespass actions for environmental claims are usually instituted with other common law torts such as nuisance and strict liability. See the case of *MTN NIG Communication LTD V. Sadiku*⁹² and *Samuel Ola Oladehin V. Continental Textile Mills LTD*. There are defences to trespass; they are license and right of entry. A defendant who is able to plead the defence of license will not be held liable for trespass.

⁸⁶ *Shell Petroleum Development Company Nigeria Ltd v. Anaro* (2000) 23 WRN 111 where the Court of Appeal held that the accumulation of crude oil in a waste pit is a non-natural use of land

⁸⁷ natural user and reasonableness test.

⁸⁸ Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria)

⁸⁹ (1990) 6 NWLR (Pt. 159) 693

⁹⁰ *Adetono V Zenith International Bank PLC* (2011) LPELR-8237 (SC)

⁹¹ *MTN NIG Communication LTD V. Sadiku* (2013) LPELR-21105 (CA)

⁹² (2013) LPELR-21105

3.1.5. Enforcement of Human rights

Environmental issues are also litigated through the enforcement of human rights. The inadequacies of torts actions in alleviating environmental pollution in Nigeria have also contributed to the use of human rights litigations as alternatives for litigating environmental matters.⁹³ Therefore, human rights violations can be litigated by environmental victims or interested third parties in a representative capacity⁹⁴ for the benefit of the general public⁹⁵, where such rights are breached through environmental pollution and degradation in Nigeria. Human rights litigations are usually speedily dispensed with by the Court, they are not characterised with the challenges peculiar to tort actions and usually decree remediation of the environment, thereby enhancing environmental sustainability.⁹⁶ See *Gbemre V. Shell Petroleum Development Company Limited*⁹⁷

3.1.6. Criminal Prosecution

This is another means of redressing environmental breaches in Nigeria. Most environmental laws in Nigeria criminalize environmental pollution and stipulate penalties⁹⁸ for contravening their provisions. In addition public nuisance is classified as a crime; so where a tortfeasor's acts interfere with the enjoyment of land by the generality of the population or causes injury to all of a class within the population, he will be criminally liable⁹⁹. Therefore, an environmental offender will be liable to prosecution and sanctioned by the Court accordingly. The appropriate government authority or its officer and private persons will have the *locus standi* to prosecute an environmental offender, and where such an offender is found culpable of the crime and convicted by the court, he will be penalised. The penalty may be in different forms; it can be a fine, terms of imprisonment, forfeiture, or any other appropriate penalty. The case of *Federal Government V O.K Isokariari and Sons Ltd*¹⁰⁰ and *NESREA V Helios Towers Nigeria Limited and Kaduna Environmental Protection Agency (KEPA)*.¹⁰¹

⁹³ Okonmah P. D, P. 99

⁹⁴ Lawson N.G, P.119.

⁹⁵ Okonmah P. D, P. 99

⁹⁶ *Gbemre V. Shell Petroleum Development Company Limited* Suit No: FHC/B/CS53/05

⁹⁷ Suit No: FHC/B/CS53/05

⁹⁸ National Environmental Standards and Regulations Enforcement Agency Act, ss. 20 (3) and (4), 21(3), 22(3) and (4), 24(4) and (5), 25(2), 26(3) and (4), and 27(3), (4) and (5) , Harmful Waste (Special Provision etc) Act, ss 6 -7 of, Oil in Navigable Waters Act, s.6 , Associated Gas Re-injection Act, s.4 etc

⁹⁹ *Adediran V. Interland Transport* (Supra)

¹⁰⁰ (Unreported Suit) Federal High Court Porthacourt

¹⁰¹ (Unreported Suit) Federal High Court Kaduna

4. LEGAL AND PROCEDURAL BARRIERS TO ENVIRONMENTAL LITIGATION

These are the barriers that hinder environmental litigants from seeking redress for environmental harms and injuries they have suffered;

4.1 Burden of proof

Burden of proof is the legal burden of establishing a case and adducing evidence to prove the issues which arose in the case.¹⁰² The burden of proof to be established could be on the balance of probabilities or beyond reasonable doubts. It is pertinent to note that the burden of proof is placed on he who asserts¹⁰³ ; therefore the plaintiff in a civil case and the prosecution in a criminal matter must discharge the burden of proof to establish the liability of the defendant or offender before the court¹⁰⁴ before he can succeed.

See *Seismograph Services Limited V Benedict Onikpasa and Jumbo V. Shell B. P*¹⁰⁵ where the plaintiffs lost their claims because of failure to discharge burden of proof.

4.2 Locus standi

This is the legal capacity of a plaintiff to institute a matter in Court. Whether a civil or criminal matter; the party instituting a proceeding must have the legal capacity to do so. For a civil environmental matter, *locus standi* is not always difficult, as a plaintiff whose property has been damaged or suffered an injury due to the acts of a defendant will have the capacity to institute an action to seek remedies. In the same vein, the appropriate Government authority or its officer will have *locus* in prosecuting an environmental criminal in Nigeria. However, where public nuisance is alleged, it is the Attorney General or an individual that has obtained the consent of the Attorney General that institute a proceeding with respect to such public nuisance.¹⁰⁶ But where an environmental victim can establish before the Court that he has suffered over and above other members of the public in a public nuisance, he will have the *locus standi* to institute the proceeding even without obtaining the consent of the Attorney General.¹⁰⁷ The challenges of *locus standi* however arise when environmental matters are

¹⁰² Hassan A. M, *Problem of Proof and Causation in Environmental Litigation In Nigeria* (2015) (Unpublished First Degree Long Essay, Faculty of Law, University of Lagos, Nigeria) 76

¹⁰³ Premised on the legal maxim ‘ *Ei qui affirmat non qui negat incumbit probatio*

¹⁰⁴ Hassan A. M, 76-77

¹⁰⁵ (1999) 13 NWLR (pt 633) p. 57

¹⁰⁶ This is because public nuisance is classified as a crime, *Amos V Shell Petroleum Development Company Nigeria Limited* (1977) SC 109

¹⁰⁷ *Adediran V. Interland Transport* (Supra)

instituted in a representative capacity. Representative claimants are however confronted with the barrier of *locus standi*, as a plaintiff must establish before the Court that he has sufficient interest in the matter he is instituting and such interest is exclusive to him.¹⁰⁸ If a plaintiff fails to show the Court that he has sufficient interest in the matter, the Court will decline jurisdiction.¹⁰⁹ In *Amos V SHELL PETROLEUM DEVELOPMENT COMPANY of Nigeria LTD*¹¹⁰, and *Seismograph Services (Nigeria) Limited V Ogbeni*¹¹¹, the courts dismissed the plaintiffs' claims as a result of failure to show the Court that they had *locus standi*.

4.3 Limitation of action

This can be described as limiting of the period under which a victim or a sufferer can institute an action against an alleged tortfeasor or abuser. It is the statutory period after which a lawsuit cannot be instituted in court.¹¹² Ordinarily, the law permits every citizen whose right has been violated or who suffers damages due to the conduct of another to approach the court for a redress or sought reliefs.¹¹³ Therefore, once a person has a cause of action, he is entitled to approach the Court for a remedy.¹¹⁴

However, because of public policy and fairness, the legislatures have made statutory provisions for limitation of action. This is to ensure that claims are not left in perpetuity and to also bring an end to litigation.¹¹⁵ So, where the statutory period within which an action must be instituted has expired, no proceeding can be commenced after the expiration of that period.¹¹⁶ Such an action will be statute barred, as the plaintiff will not be able to seek any judicial intervention to enforce the cause of action. Limitation of action is also applicable to environmental matters; so the limitation laws of the applicable state will be applied to environmental lawsuits. Where the tort involves a personal injury to the plaintiff, he must commence his action in Court within three years from the date the cause of action accrued. Other statutes also make provision for limitation of action.¹¹⁷ To determine the period of limitation, the court will examine the writ of summons and the statement of claim to ascertain the date the cause of action accrued from the statement of claim and compare the date with the date the writ of summons was filed. Once the

¹⁰⁸ R.A Mmadu, P.161

¹⁰⁹ Abdulkadir B.A and Ainul J.A, P. 20

¹¹⁰ (1977) SC 109

¹¹¹ (1976) 4 SC 85

¹¹² *Nasir V. Civil Service Commission, Kano State* (2010) LPELR-1943 (SC)

¹¹³ *Shell Petroleum Development Company LTD V. Meburu* (2013) LPELR-21889 (CA)

¹¹⁴ *Kano State House of Assembly V. Umar* (2014) CA/K/138/2006

¹¹⁵ ICJ Report P. 49

¹¹⁶ *Shell Petroleum Development Company V. Meburu* (Supra)

¹¹⁷ Public Officers Protection Act, S.2 (a) and Nigerian National Petroleum Corporation Act, S.12 (1)

court finds that the date of filing the writ is beyond the limitation period as stipulated by the enabling statute, the action will be statute barred and the action will be dismissed by the court.¹¹⁸ This puts a lot of hardship on environmental victims in Nigeria; as a plaintiff whose claim is statute barred will be barred from enforcing his right of action; even where he has obviously suffered injuries and has a cause of action.¹¹⁹ In the case of *Asaboro V. Pan Ocean Oil Corporation Nigeria Limited*¹²⁰, where the Supreme Court held that by virtue of section 4 of the Bendel State Statute of Limitation Law that was applicable to Delta State, the appellants have only six years to commence their suits in Court after the cause of action accrued. And since the cause of action accrued in 1971, the appellants' claims were statute barred by 1994 when they initiated their action in Court. In *Egwuini V. Tom Agada*¹²¹ the Court of Appeal held that where a cause of action that should ordinarily be statute barred is of continuing damage or injury to the plaintiffs, it will not be statute barred as the continuity of the damage will re-activate the cause of action.

5. JUDICIAL ACTIVISM AND ENVIRONMENTAL LITIGATION

Judicial activism is an aged long concept which has its origin in the United States' case of *Marbury V Madison*,¹²² and there is no any precise acceptable definition of the concept. Its meaning is construed from the context in which it is used,¹²³ and often influenced by the individual perception of the concept. It has been defined as a means of providing new meaning by the court as required by the dynamism of law to various open textured expressions and insufficiently explicit provisions of the Constitution.¹²⁴ It is also the circumstance when the court assumes the duty of rendering justice while adjudicating on issue on which there are no statutory provisions.¹²⁵ It is the most valuable instrument used by the judges when the legislative machinery is not applicable to a given matter. Judicial activism allows the courts to

¹¹⁸ *Shell Petroleum Development Company LTD V. Meburu* (Supra)

¹¹⁹ *Asaboro v. Pan Ocean Oil Corporation Nigeria Limited* (2017) LPELR-41558 (SC), *Egwuini V. Tom Agada* (2018) LPELR-44683-(CA)

¹²⁰ Supra

¹²¹ Supra

¹²² (1803) 5 U.S. (1 Cranch) 137

¹²³ Ibrahim I, "Judicial Activism In Nigeria: Delineating The Extend Of Legislative-judicial Engagement In Law Making" 15/1 *Palacký University Olomouc, Czech Republic: International and Comparative Law Review* 114 (2015)

¹²⁴ Ibrahim I., 115 (2015)

¹²⁵ Pathak P, "Acceptability of Judicial Activism in India Perspective" 3/3, *International Journal of Law and Legal Jurisprudence Studies*, 130&143 (2016)

apply enacted laws and at the same time expound, develop and even change the enacted laws within their functions.¹²⁶

The application of judicial activism to environmental litigation will ensure environmental protection and enhance the realization of environmental justice. The Courts in the discharge of their duties can give more life to environment legislation through their activism. Judicial activism will enable the Courts to be creative and innovative in interpreting environmental legislation. It is worthy to note that the protection of the environment is crucial to all human endeavours. Hence, the Court being the last hope of the common man can facilitate the protection of the environment and realization of environmental justice through activism.

Judicial activism has been applied to different areas of law such as protection of Fundamental human rights¹²⁷; citizens' access to legal process, administrative law¹²⁸ etc. and it has proven to be effective. Therefore, the application of judicial activism to environmental litigation will help to mitigate the barriers to environmental litigation, as it will enable the Courts to devise different means such as purposive interpretation of the law, nullifying legislation, expanding the meanings of extant legal provisions, allowing Public Interest Litigation, widening *locus standi*. This will help to enhance access to environmental justice, facilitate redress of environmental wrongs, enhance adequate remedies for environmental victims, allow the proper sanctioning of environmental polluters and also enhance the protection and sustainability of the environment.

There are different forms of judicial activism that are applicable to judicial decisions.¹²⁹ The dimensions of judicial activism are briefly discussed below:

i. Striking Down Arguably Constitutional Actions of Other Branches

The judicial invalidation of legislative enactment has been described as judicial activism.¹³⁰ So a court is said to engage in judicial activism where it intervenes and strikes down a piece of duly enacted legislation¹³¹, especially where judges disallow policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.¹³²

¹²⁶ Bhagwati P.N "The Role Of The Judiciary In The Democratic Process: Balancing Activism And Judicial Restraint" 18/4 *Commonwealth Law Bulletin* 1262&1267 (1992)

¹²⁷ Quansah E.K and Fombad C.M, (2012)

¹²⁸ Leyland P., Anthony G(eds.), *Textbook on Administrative Law*, 16 (Oxford University Press, Oxford, 2016)

¹²⁹ Marshall W.P, "Conservatives and the Seven Sins of Judicial Activism" 73 *University of Colorado Law Review*, 1219 (2002)

¹³⁰ Kmiec K.D, 1463

¹³¹ G. Jones, "Proper Judicial Activism" 14 *Regent University Law Review*, 141- 143 (2002)

¹³² L. A. Graglia, "It's Not Constitutionalism, It's Judicial Activism" 19 *Harvard Journal of Law and Public Policy* 293 &296 (1996),

ii. Ignoring Precedent

The act of judges ignoring judicial precedents has also been defined as judicial activism¹³³. A Court may be said to engage in judicial activism when it fails to abide by vertical or horizontal precedents.¹³⁴

iii. Judicial Legislation

This is when judges legislate from the bench¹³⁵, although some jurists¹³⁶ have criticized this in the past. This form of judicial activism connotes statutory interpretation in a manner that expands or gives birth to new rules of law.¹³⁷

iv. Departures from Accepted Interpretive Methodology

Judicial activism may occur when a Court fails to use the judicial interpretative tools appropriately or at all. A judge may be accused of judicial activism when he chooses to follow rules of interpretation different from established rules.

v. Result-Oriented Judging

This form of judicial activism will only occur when the judge has an ulterior motive for giving his decision and such a decision departs from some "baseline" of correctness. Therefore, the mere failure of the Court to defer to political branches or to vindicate norms of predictability and uniformity does not automatically mean judicial activism. The failure to do so must be to advance another unofficial objective.

Judicial activism can be in the form of literal interpretation of the Constitution or by striking down any law as unconstitutional or by overruling any judicial precedents or providing guidelines in certain cases.

6. CONCLUSION AND RECOMMENDATION

This paper has discussed different barriers to environmental litigation in Nigeria; that prevent victims from getting redress for environmental wrongs and accessing environmental justice. This invariably increase environmental pollution in Nigeria, as environmental polluters continue be exonerated from liability for polluting the environment due to one technicality or

¹³³ Kmiec K.D, 1466

¹³⁴ ibid

¹³⁵ Kmiec K.D, 1471

¹³⁶ Justice Powell's opinion in *Columbus Board of Education v. Penick* 443 U.S. 449 (1979). also Justice Black's dissent decision in *United States v. Wade* 388 U.S. 218 (1967).

¹³⁷ Diala A.C, 8

the other. The Court being the last hope of the common man must be ready to display activism in adjudicating environmental matters and be creative in arriving at its decision in order to enhance redress for environmental wrongs and access to environmental justice. The protection and sustainability of the environment in Nigeria will be realized when environmental victims are not constrained in obtaining redress for environmental wrongs in Courts¹³⁸ and can access environmental justice. *Res ipsa loquitor* can be adopted by the Court and the onus of burden of proof can be shifted to the defendant to show the Court while he should not be held liable. The Court should also allow a plaintiff to litigate his action, where the cause of action is of continuing nature.

This paper therefore recommends that the Courts must exhibit judicial activism in environmental matters, as it will help in granting access to environmental victims to redress environmental wrongs by mitigating the barriers to environmental litigation. This will help to build the confidence of environmental victims in the judiciary; as their cause of action will not be turned down by unnecessary technicalities. It will also help to facilitate the proper sanctioning of environmental polluters, thereby dissuading potential polluters. It will enhance adequate remedies for environmental victims and enhance the protection and sustainability of the environment in Nigeria.

¹³⁸ R Mmadu, P. 17